BAR MALAYSIA v. NEASARANI T SINGARA THEVAR & ANOR

COURT OF APPEAL, PUTRAJAYA
BALIA YUSOF WAHI JCA
HAMID SULTAN ABU BACKER JCA
VERNON ONG LAM KIAT JCA
[CIVIL APPEAL NO: W-02-761-04-2014]
21 SEPTEMBER 2015

LEGAL PROFESSION: *Disciplinary Committee – Findings of – Disciplinary Committee decided on issue not complained by complainant – Respondents suspended from legal practice – Jurisdiction of Disciplinary Committee – Whether Disciplinary Committee stepped out of boundaries – Whether Legal Profession Act 1976 permits Disciplinary Committee to clothe itself as judge, prosecutor and executioner*

CIVIL PROCEDURE: *Appeal – Memorandum of appeal – Findings of Disciplinary Committee – Disciplinary Committee decided on issue not complained by complainant – Decision of Disciplinary Committee set aside by High Court – Appeal against decision of High Court – Memorandum of appeal not related to issues addressed by High Court – Whether complied with r. 18(1) Rules of the Court of Appeal 1994*

The respondents, legal practitioners in the Malaysian Bar, were investigated by the Disciplinary Committee ('the DC') for a particular complaint lodged by two complainants relating to withholding of documents and falsification of power of attorney. The DC concluded that the respondents had facilitated a money-lending transaction even though the complaints had nothing to do with the said issue. Consequently, the respondents were suspended from legal practice. However, the decision of the DC was set aside by the High Court as it was deemed bad in law. The High Court further held that the jurisdiction of the DC was always a limited one and its purpose was to determine the complaints as lodged by the complainants. Hence, the present appeal. The appellant's memorandum of appeal ('MOA') did not, in any manner, relate to the issues addressed by the High Court. Instead, the appellant anchored his argument on the submission that the DC was entitled to travel at its discretion to parameters other than that reflected in the complaint and/or its mandate.

Held (dismissing appeal)
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) The MOA did not comply with r. 18(1) of the Rules of the Court of Appeal 1994 and the main submission of the appellant was nowhere to be found in the MOA. In consequence, the appeal must be dismissed *in limine*. It is trite that the strict rules to the MOA do not permit the appellant to travel out of what has been said in the MOA. It is not sufficient to just assert the complaint in a general form without setting out the specifics of the complaint in the MOA. (paras 5 & 7)

A **(2)** Disciplinary actions are *quasi* penal in nature. Procedural fairness in such proceedings is part of constitutional guarantees under the Federal Constitution. The complaint by the complainant had nothing to do with the money-lending transaction. The DC was not mandated to inquire misconduct relating to money-lending transaction. The Legal Profession
B Act 1976 does not permit the DC to clothe itself as a judge, prosecutor and executioner. (para 8)

Bahasa Malaysia *Translation Of Headnotes*

Responden-responden, pengamal undang-undang di bawah Majlis Peguam
C Malaysia, telah disiasat oleh Jawatankuasa Disiplin ('DC') atas aduan oleh dua orang pengadu berkenaan keengganan mengemukakan dokumen dan pemalsuan surat kuasa wakil. DC memutuskan bahawa responden-responden telah membantu dalam transaksi pinjaman wang sedangkan aduan yang dibuat tiada kaitan dengan isu tersebut. Akibatnya, responden-responden digantung daripada amalan guaman. Walau bagaimanapun, keputusan DC
D diketepikan oleh Mahkamah Tinggi kerana dikatakan cacat dari segi undang-undang. Mahkamah Tinggi seterusnya memutuskan bahawa bidang kuasa DC terhad dan tujuannya adalah untuk memutuskan aduan yang dibuat oleh pengadu. Oleh itu, rayuan ini. Memorandum rayuan ('MOA') perayu tidak, dalam apa-apa jua cara, mempunyai kaitan dengan isu-isu yang diputuskan
E oleh Mahkamah Tinggi. Sebaliknya, perayu mendasarkan pertikaiannya kepada hujahan bahawa DC berhak untuk memutuskan atas budi bicaranya dalam parameter selain daripada yang dicerminkan dalam aduan dan/atau mandatnya.

F **Diputuskan (menolak rayuan)**
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Memorandum rayuan tidak mematuhi k. 18(1) Kaedah-kaedah Mahkamah Rayuan 1994 dan hujahan utama perayu tidak dijumpai
G dalam MOA. Akibatnya, rayuan mesti ditolak *in limine*. Adalah matan bahawa peraturan-peraturan ketat MOA tidak membenarkan perayu tersasar keluar daripada apa yang dinyatakan dalam MOA. Tidak cukup sekadar menegaskan aduan secara umum tanpa menyatakan butiran aduan dalam MOA.

H **(2)** Tindakan disiplin bersifat separa menghukum. Keadilan prosedur dalam prosiding sedemikian adalah sebahagian daripada jaminan perlembagaan di bawah Perlembagaan Persekutuan. Aduan oleh pengadu tiada kaitan dengan transaksi pinjaman wang. DC tidak dimandatkan untuk menyiasat tentang salah laku transaksi pinjaman wang. Akta Profesion
I Undang-undang 1976 tidak membenarkan DC bertindak sebagai hakim, pendakwa dan algojo.

Case(s) referred to:
Bato Bagi v. Kerajaan Negeri Sarawak [2011] 8 CLJ 766 FC ***(refd)***
Ding Siew Ching v. Ling Peek Hoe [2014] 8 CLJ 156 CA ***(refd)***
Fairmont Investment v. Secretary for the Environment [1976] 2 All ER 865 ***(refd)***
Government Of The State Of Sabah v. Syarikat Raspand [2010] 7 CLJ 945 CA ***(refd)***
H. Sabey & Co. Ltd. v. Secretary of State for the Environment [1978] 1 All ER 586 ***(refd)***
Jaafar Ibrahim v. Gan Kim Kin [1985] 1 LNS 176 FC ***(refd)***
Kekatong Sdn Bhd v. Danaharta Urus Sdn Bhd [2003] 3 CLJ 378 CA ***(refd)***
Koh Mui Tee v. Chin Lee & Ors [2014] 1 LNS 966 CA ***(refd)***
Md Desa Hashim v. PP [1995] 4 CLJ 677 FC ***(refd)***
PP v. A Juvenile [1990] 1 CLJ 968; [1990] 2 CLJ (Rep) 669 HC ***(refd)***
Rohana Ariffin v. Universiti Sains Malaysia & Another Case [1988] 1 CLJ 559; [1988] 2 CLJ (Rep) 390 HC ***(refd)***
Seah Pong Tshai [1992] 1 SLR 399 ***(refd)***
Tan Tiang Hin Jerry v. Singapore Medical Council [2000] 2 SLR 274 ***(refd)***

Legislation referred to:
Rules of the Court of Appeal 1994, r. 18(1)

For the appellant - SK Liow; M/s Liow & Co
For the respondents - K Thavanesan; M/s Fauzi Ngah & Neasa

[Appeal from High Court, Kuala Lumpur; Originating Motions No: R1-17-38-2011 & R1-17-28-2011]

Reported by Najib Tamby

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellant, Bar Malaysia, is the intervener in the High Court and appeals against the decision of the learned High Court Judge who had set-aside the order of Disciplinary Board (DB) dated 19 May 2011 which had suspended the respondents. The two respondents are legal practitioners in the Malaysian Bar.

[2] We heard the appeal on 15 April 2015 and reserved judgment. My learned brothers Balia Yusof bin Haji Wahi JCA and Vernon Ong Lam Kiat JCA have read the judgment and approved the same. This is our judgment.

Preliminaries

[3] In the instant case, the learned High Court Judge had written a 20 page judgment, setting out the facts and reasons for setting aside the order of DB. The central issue in the judgment and that appeal was that the respondents were investigated by the Disciplinary Committee for a particular complaint lodged by two complainants relating to withholding of documents and falsification of power of attorney. The complaints of the complainant had nothing to do with the respondents facilitating a money lending transaction.

A However, the DC concluded that the respondents had facilitated a money lending transaction. This conclusion the learned trial judge in an articulate judgment says is bad in law. His Lordship observed:

> There is merit in the complaint by the appellants that the DC had waded into a territory which it was not constituted to ultimately rule upon. The
B jurisdiction of the DC, just like any other *quasi*-judicial bodies, is always a limited one. Its purpose had been to determine the complaints as lodged by the complainants against the appellants.

[4] The whole judgment of the learned trial judge was related to that issue only. However, the appellant's memorandum of appeal does not in any
C manner relate to the issues addressed by the High Court as per the judgment, even though learned counsel for the appellant had anchored in his submission before us that the Disciplinary Committee is entitled to travel at its discretion to parameters other than that reflected in the complaint and/or its mandate. The judgment of the learned High Court Judge must be read with this
D judgment for comprehensiveness and to deal with the issue of money lending transaction which was not part of the complaint by the original complainants.

[5] We also note that the appellant has not specifically raised this issue relating to money lending transaction in the memorandum of appeal. It is trite that the strict rules to the memorandum of appeal do not permit the
E appellant to travel out of what has been said in the memorandum of appeal. [See *Government Of The State Of Sabah v. Syarikat Raspand* [2010] 7 CLJ 945; [2010] 5 MLJ 717; *Jaafar Ibrahim v. Gan Kim Kin* [1985] 1 LNS 176; [1985] 2 MLJ 24]. In addition, it is not sufficient to just assert the complaint in a general form without setting out the specifics of the complaint in the
F memorandum of appeal. The memorandum of appeal reads as follows:

> 1. The Learned Judge erred in law in allowing the Respondents' Appeal pursuant to Section 103E of the Legal Profession Act, 1976 wherein the Disciplinary Board's Order dated 19.5.2011 was set aside.
>
G 2. The Learned Judge erred in law and in fact in holding that the Disciplinary Committee failed to satisfy the burden of proof necessary to justify the finding of guilt against the Respondents.
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> 3. The Learned Judge erred in law and in fact in finding that the evidence led before the Disciplinary Committee was insufficient to
H justify/support the finding of guilt against the Respondents.
>
> 4. In failing to take into account and consider the matters abovementioned, whether sufficiently or at all, the learned Judge erred in law in allowing the Respondents' appeal and in setting aside the Disciplinary Board's Order dated 19.5.2011.
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I 5. The Appellant reserves their right to amend and/or vary and/or add the ground of appeal, if necessary, upon receipt of the full written grounds of judgment.

[6] Rule 18(1) of the Rules of the Court of Appeal 1994 read as follows: A

> The appellant shall prepare a memorandum of appeal setting forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, and specifying the points of law or fact which are alleged to have been wrongly decided; such grounds to be numbered consecutively. B

[7] We are of the considered view that the memorandum of appeal does not comply with r. 18(1) of the Rules of Court of Appeal 1994 and the main submission of the appellant is nowhere found in the memorandum of appeal and in consequence the appeal must be dismissed *in limine* ie the issue relating to money lending transaction. However, as the respondent did not C take objection, we just like to briefly say why the appeal has no merits, without dwelling into the facts and law in great detail as the learned judge has comprehensively dealt with the relevant issues and the law.

[8] We have read the appeal records and able submission of the parties. After much consideration to the submission of learned counsel for the D appellant, we take the view that the appeal must be dismissed. Our reasons *inter alia* are as follows:

(i) disciplinary actions are *quasi* penal in nature. Procedural fairness in such proceeding is part of constitutional guarantees under the Federal E Constitution. Support for the proposition is found in a number of cases. We do not wish to set them out here. [See *Bato Bagi v. Kerajaan Negeri Sarawak* [2011] 8 CLJ 766; [2013] 5 BLR 727].

(ii) in addition the respondent's citation of the following cases in support of their proposition that: F

(a) the DC has no jurisdiction to go beyond the complainant and make a finding of guilty on a matter not before it ie jurisdictional failure; and/or

(b) even if it has the jurisdiction, the additional complaint and/or allegation had to be put first to the respondent, to allow them to give G an explanation, otherwise it would tantamount to making a decision behind the back of the respondent.

was useful in arriving at this decision, namely:

(i) *Tan Tiang Hin Jerry v. Singapore Medical Council* [2000] 2 SLR 274; H (ii) *Seah Pong Tshai* [1992] 1 SLR 399; (iii) *Fairmont Investment v. Secretary for the Environment* [1976] 2 All ER 865; (iv) *H Sabey & Co Ltd v. Secretary of State for the Environment* [1978] 1 All ER 586.

(iii) in the instant case, the complaint by the complainant had nothing to do with money lending transaction. The DC was not mandated to inquire I misconduct relating to money lending transaction. The DC conclusion reads as follows:

> We are of the opinion that the Respondents as Advocates and Solicitors facilitated a money-lending transaction such as that in the present case is highly improper.

This is perverse and the DC had acted outside its jurisdiction.

(iv) in addition, we also note that the rule of natural justice has also been breached in the instant case which issue has been dealt with by the learned judge adequately. [See *Rohana Ariffin v. Universiti Sains Malaysia & Another Case* [1988] 1 CLJ 559; [1988] 2 CLJ (Rep) 390; [1989] 1 MLJ 487].

(v) it was the contention of learned counsel for the appellant that most jurisdiction allow the DC (or its equivalent entity) to go beyond the scope of the complaint provided they are related to the original complaint, and that the respondent is given sufficient notice of the scope and extent of the investigation. The submission of learned counsel on this issue reads as follows:

> 3. As an observation, it is noted that most jurisdictions allow the DC (or its equivalent entity) to go beyond the scope of the complaint, provided they are related to the original complaint, and that the Respondent is given sufficient notice of the scope and extent of the investigation. In our case, it is respectively submitted that the numerous money-leading issues were indeed related to the original complaint, adequately ventilated during the various Q&A sessions in the DC inquiry, and sufficient opportunity were given to the 2 Respondents to rebut or explain their positions.
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> 4. The other issue to be highlighted is that for certain jurisdictions like Singapore and New Zealand, the complainant's Charge has to be framed by the appointed body. Given that Malaysia falls under the 'non-framing' regime, so-to-speak, this essentially means that the parameters of the Complaint can be reasonably extended without any issue, so long as the additional issues are related to the original complaint, and sufficient notice is given to the relevant respondent.

(vi) even as per the submission of learned counsel for the appellant, it must be related to the original complaint by the first complainant as disclosed in his letter dated 15 October 2009 to the Lembaga Tatatertib Peguam-Peguam and must be given notice of the extent of investigation. Clearly that was not done in this case to justify there was indeed procedural fairness. In addition, the Legal Profession Act does not permit the DC to clothe itself as a judge, prosecutor and executioner. Malaysian jurisprudence and constitutional safeguards do not permit that. [See *Md Desa Hashim v. PP* [1995] 4 CLJ 677; [1995] 3 MLJ 350; *PP v. A Juvenile* [1990] 1 CLJ 968; [1990] 2 CLJ (Rep) 669; [1990] 3 MLJ 117].

(vii) the appellant has brought to our attention one or two cases in Malaysia which support the proposition that the DC can travel outside its mandate. [See *Koh Mui Tee v. Chin Lee & Ors* [2014] 1 LNS 966*; Ding Siew Ching v. Ling Peek Hoe* [2014] 8 CLJ 156]. We have read those cases and the counsel in those cases have not guided the court with relevant jurisprudence and case laws to permit the DC to enjoy the role of judge, prosecutor and executioner, taking into consideration the constitutional guarantees to procedural fairness entrenched in our Federal Constitution. [See *Kekatong Sdn Bhd v. Danaharta Urus Sdn Bhd* [2003] 3 CLJ 378; [2003] 3 MLJ 1].

[9] For reasons stated above, we find no merit in the appeal. In consequence, the appeal is dismissed. On the issue of costs, we will hear the parties and make the necessary order.

We hereby order so.